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# STANDING RIGHTS AND REGULATORY DYNAMICS IN THE EU

Anne Meuwese<sup>1</sup>

## Introduction

Judicial review for fidelity to legislative and constitutional commands – the classic understanding of the rule of law – is today complemented by scrutiny for policy rationality, adherence to fundamental rights, and compliance with procedural guarantees.<sup>2</sup> Simultaneously, our understanding of the lawmaking process has become more sophisticated with more attention for rational output and evaluation on the one hand and deliberation and participation on the other. This twofold development has paved the way for analyses of the (changing) dynamics between the legislature and the judiciary. Shapiro has even called the relationship between judicial review and the ‘deliberative move’ – the trend towards infusing decision-making processes with greater opportunities for participation and reasoning – the key question for EU administrative law in the years to come.<sup>3</sup> Scott and Sturm have revealed how courts through their interpretation of standing rules and their choice for a certain standard of review can influence the dynamics between citizens and institutions in legislative and administrative arenas, by providing “an incentive structure for participation, transparency, principled decision-making, and accountability”<sup>4</sup>. They famously classified the European Union (EU) courts as ‘catalysts’ by showing – among other things – how certain European Court of Justice (ECJ) rulings on standing had a direct link to the right to participate in ‘new governance’. This socio-legal study still stands more or less on its own though. The connection between regulatory politics and judicial decision-making is still unclear, both in empirical and conceptual terms. Shapiro’s plea for rules and regulation to be the central object of administrative law as opposed to the particular applications of regulatory norms to individuals is still salient almost ten years after it was made.<sup>5</sup> Although the suggested focus is certainly not yet a reality for EU administrative law, as EU rulemaking becomes more intrusive, demands for increased participation rights on the one hand and more intense judicial review on the other are noticeable. One factor here is that a lot of rules issued in the EU context have profound effects for third country nationals, especially in the trade domain. The existence of regulatory stakeholders who are not EU citizens has sparked an interest in the

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<sup>2</sup> Francesca Bignami, ‘The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology’, *Harvard International Law Review*, 40 (1999), p. 451.

<sup>3</sup> Martin Shapiro (2003), ‘Trans-Atlantic: Harlow Revisited’, in: P. Craig and R. Rawlings (eds.), *Law and Administration in Europe; Essays in Honour of Carol Harlow*, Oxford: Oxford University Press, p. 225-239, at p. 234.

<sup>4</sup> Joanne Scott & Susan Sturm, ‘Courts as Catalysts: Rethinking the Judicial Role in New Governance’, Columbia Law School Public Law & Legal Theory Working Paper Group. New York, 2007.

<sup>5</sup> Shapiro (2003), p. 226.

institutional structure of the EU, beyond the territorial borders of the EU.<sup>6</sup> Explain the fundamentals of the EU system of judicial review to an American lawyer and chances are he or she will be surprised or even outraged. “How can you claim to have ‘better regulation’ when individual citizens cannot even – as a general rule - file for judicial review of regulations?”, is a not uncommon reaction at seminars dedicated to the development of regulatory policy in the EU. This area is currently governed by ‘Better Regulation’ policy as a normative and procedural framework. This horizontal policy is to be distinguished from ‘new governance’ in the sense that it applies techniques that are more or less ‘new’ to EU policy making such as impact assessment, to ‘old’ instruments such as directives and regulations. The Better Regulation programme employs a twofold strategy. On the one hand there are stricter procedural conditions for lawmaking processes, such as consultation requirements. On the other hand the strategy relies on the operationalization of enhanced substantive quality requirements such as proportionality through instruments such as impact assessment. Although there is an emerging literature on the implications of Better Regulation on judicial review,<sup>7</sup> the issue of standing has not received much attention as of yet.<sup>8</sup> Now that the first case on the exact interpretation of the new standing rules has been decided – at the instigation of third country nationals<sup>9</sup> - it is appropriate to think through the implications for the way we conceive of legislation/regulation at the EU level in the era of Better Regulation. Does the institutional structure as refined by the ECJ in its recent case law support or undermine efforts to improve the quality of EU rules through stricter procedural conditions and enhanced substantive quality requirements? A related issue is the development of the relationship between legislation proper and ‘lower’ forms of rulemaking in the EU. The Lisbon Treaty has introduced a clearer idea of ‘hierarchy’ between primary norms (legislative acts) and derived norms (non-legislative acts), whilst retaining a formal approach to the definition of either category. The Better Regulation strategy on the other hand, has pushed in the other direction, namely that of a more substantive treatment of ‘regulation’ and a problem driven approach to finding the right type of instrument. The recent expansion of the requirement to carry out an impact assessment not only to policy initiatives and proposals for legislative acts but also to proposals for non-legislative acts – the former ‘comitology’ measures – is illustrative of this approach.<sup>10</sup>

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<sup>6</sup> Anne Meuwese (2011), ‘EU–US Horizontal Regulatory Cooperation: Mutual Recognition of Impact Assessment?’, in D. Vogel & J. Swinnen (eds.), *Transatlantic Regulatory Cooperation. The Shifting Roles of the EU, the US and California*, Cheltenham: Edward Elgar, p. 249-270.

<sup>7</sup> David Keyaerts, *De Doorwerking van het wetgevingsbeleid in de Rechtspraak van het Hof van Justitie*, thesis defended in Antwerp (2011); Alberto Alemanno, ‘The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission’s Walls or the Way Forward?’, (2009) 15(3) *European Law Journal*, 382-401.

<sup>8</sup> Voermans & Schuurmans (2011).

<sup>9</sup> *Inuit Tapiriit Kanatami and Others v Parliament and Council*, 6 September 2011, Case T-18/10 R.

<sup>10</sup> The European Parliament had been pushing for this to happen: “[M]uch secondary legislation comes into being via the ‘comitology procedure’; [...] such legislation must meet the same quality requirements as primary legislation and [...] must therefore also be subject to impact assessment; [...] Parliament should have the right, in the context of quality assurance for European legislation, to subject comitology legislation to Parliamentary

Against the background of these simultaneous but not always aligned developments in the field of EU regulatory and legislative policy – Treaty induced versus Better Regulation induced - this contribution takes up the perspective of judicial-regulatory dynamics and applies it to the recent change in *locus standi* (standing rights) for individual applicants. Article 263 TFEU significantly widens the standing rules for non-privileged applicants (i.e. other than Member States or EU institutions and bodies) by adding a new limb stating that if the act appealed against is ‘regulatory’ and ‘does not entail implementing measures’, applicants merely need to demonstrate ‘direct concern’ and do not need to worry about showing ‘individual concern’. To be precise, the fourth paragraph of Article 263 TFEU (ex-Article 230(4)), provides that “[a]ny natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”.<sup>11</sup> With the removal of the requirement of individual concern for appeals against certain types of acts, it became possible that non-privileged applicants no longer need to pass the ‘Plaumann test’<sup>12</sup> in all cases, a test that had proven to exclude all measures of a general nature in practice (see section on pre-Lisbon case law).

For almost two years since the entry into force of the Lisbon Treaty the question to *what extent* this Treaty had brought a change to the issue of standing was up in the air. Legal commentators differed as to the scope of the new exception introduced in Article 263(4) TFEU.<sup>13</sup> Would the new Article 263(4) TFEU allow private litigants to challenge regulations even when they are legislative acts within the meaning of Article 289(3) TFEU? Some commentators argued in favour of such a broad interpretation.<sup>14</sup> Hofmann, Rowe & Türk too, in their new handbook on EU Administrative Law, argue that justification for equating ‘regulatory acts’ with ‘regulations’ is lacking and that the concept “should be applicable to

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approval should an impact assessment indicate that this is necessary”, EP Doorn report (2006) – European Parliament, ‘Report on Better lawmaking 2004: application of the principle of subsidiarity – 12th annual report’, Committee on Legal Affairs (rapporteur Lambert Doorn) (Brussels/Strasbourg, 2006), para. 6, p. 5.

<sup>11</sup> The ECJ nicely clarified the following in the *Microban* case: “Second, as regards the concept of direct concern, it must be observed that the expression ‘of direct concern to them’ appears twice in the fourth paragraph of Article 263 TFEU. Firstly, that provision reiterates the wording of the fourth paragraph of Article 230 EC in referring to ‘an act ... which is of direct ... concern to them’. Secondly, the fourth paragraph of Article 263 TFEU introduces the concept of ‘a regulatory act which is of direct concern to them and does not entail implementing measures’.”

<sup>12</sup> *Plaumann & Co v Commission* (25/62) [1963] E.C.R. 199; [1964] C.M.L.R. 29.

<sup>13</sup> Anne Meuwese, Ymre Schuurmans & Wim Voermans, ‘Towards a European Administrative Procedure Act’, *Review of European Administrative Law* 2, no. 2 (2009): 3-35, at p. 13.

<sup>14</sup> Stephan Balthasar, ‘Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: the New Article 263(4) TFEU’, (2010) 35 *ELRev* 542.; Wim Voermans & Ymre Schuurmans, ‘Better Regulation by Appeal’, (2011) 17 *European Public Law*, 507.

any act of general application irrespective of its form”.<sup>15</sup> At the same time, it is hard to sustain that ‘regulatory act’ should be the umbrella term, when the distinction between ‘legislative’ and ‘non-legislative’ acts was so carefully crafted in the new TFEU.<sup>16</sup> On the other hand, if the ‘masters of the Treaty’ meant to limit the new standing option to “non-legislative acts of general application”, why did they not just use that terminology?<sup>17</sup>

The anticipated EU accession to the European Convention on Human Rights also has a part to play in the discussion.<sup>18</sup> In fact, the main line of debate on this issue was cast in terms of a possible violation of the principle of effective judicial protection as laid down in the Charter of Fundamental Rights, the European Convention on Human Rights and now also in Article 19 of the Treaty on the European Union.<sup>19</sup> This contribution, however, focuses on a different aspect of the developments, namely the implications for the dynamics in the ‘lawmaking’ or ‘rulemaking’ phase in the light of the recent judicial interpretations.<sup>20</sup>

## Standing rights and regulation

The EU is often struggling with familiar concepts of public law, even those that tend to apply across legal orders and cultures. In fact, when it comes to both of the concepts central to this contribution, *locus standi* and ‘regulation’, the EU legal system seems to still be finding its feet. For instance there is the awkward classification of directives and regulations as ‘secondary legislation’, whereas these instruments are the result of a process that comes closest to what in most countries would count as the ‘primary lawmaking process’. The Lisbon Treaty fixed the terminological confusion to some extent, by introducing a distinction between legislative acts and non-legislative acts (Articles 290 and 291 in the consolidated version of the Treaty on the Functioning of the EU). At the same time, new terminological confusion has been created by introducing the term ‘regulatory act’,<sup>21</sup> which does not sit

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<sup>15</sup> Herwig Hofmann, Gerard C. Rowe, Alexander Türk, *Administrative Law and Policy of the European Union*, Oxford: Oxford University Press 2011, p. 814.

<sup>16</sup> Hofmann, Rowe & Türk (2011), p. 814.

<sup>17</sup> See also Balthasar (2010) for this line of reasoning.

<sup>18</sup> Cathryn Costello, ‘The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe’, (2006) 6(1) *Human Rights Law Review*, 87-130.

<sup>19</sup> Albertina Albors-Llorens, ‘The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?’, (2003) 62(1) *Cambridge Law Journal*, 72-92; Koen Lenaerts & Tim Corthaut, ‘Judicial Review as a Contribution to the Development of European Constitutionalism’, in: Takis Tridimas & Paolisa Nebbia (eds.), *European Union Law for the Twenty – First Century: Rethinking the New Legal Order*. Portland, Oregon, Hart Publishing (2004); Angela Ward, ‘Locus Standi under Article 230(4) of the EC Treaty: Crafting an Coherent Test for a “Wobbly Polity”’, 22 *Yearbook of European Law* (2003), p. 45-77.

<sup>20</sup> *Inuit Tapiriit Kanatami and Others v Parliament and Council*, 6 September 2011, Case T-18/10 R.

<sup>21</sup> See a.o. Cornelia Koch, “Locus standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals' right to an effective remedy” (2005) *E.L. Rev.* 511-527, at p. 511 and p. 520-521.

easily with the regular Treaty terminology. However, the use of the term ‘regulatory’ can be traced back to the days of the Convention called to prepare a constitutional text, when a distinction between ‘legislative measures’ and ‘regulatory measures’ was first contemplated.<sup>22</sup> Since the recent case law of the ECJ could give rise to a distinctive meaning of the term ‘regulatory act’ in the EU context, I will use the term ‘rulemaking’ and ‘rules’ as generic words throughout this contribution, despite the disadvantage that those terms carry a specific meaning in the American context. The current Treaties do not define the category of ‘legislative acts’ in substantive terms, but do tie it to a certain procedure to be followed. All other acts of a general nature are either delegated acts or implementing acts, again depending on formal characteristics. The distinction between directives and regulations cuts right through this new ‘hierarchy of norms’, which means that directives and regulations can be ‘legislative’, but also ‘delegated’ or ‘implementing’.

Then there is the complicated mechanism that regulates the access to the courts. In the EU judicial system, all applicants for judicial review that are not Member States, the European Parliament, the Council, the Commission, the Court of Auditors, the European Central Bank or the Committee of the Regions are deemed ‘non-privileged’ for the purpose of access to the court. This category of non-privileged applicants included bodies, offices and agencies of the European Union. No further distinction is made between natural persons and legal persons. In practice, “where regulatory rule-making is involved, those complaining of rights violations are likely to be large corporations”.<sup>23</sup> Individual citizens with an incentive to bring an action against a measure of a general nature are likely to combine their resources and be represented by interest groups.

Another filter for the group of potential applicants is the relatively high standards of review the ECJ applies for measures taken at the EU level – for instance, the ECJ is famously more lenient towards the EU institutions when assessing proportionality than it is to Member State legislatures. Craig and De Búrca have argued that it is ‘reductionist’ to use a strict test for standing in order to minimize the number of actions brought when the ECJ could do the same through setting the standards of review.<sup>24</sup>

In order to fully understand the debate on standing rights in regulatory cases, it is important to note that it has never been the case that individual applicants cannot challenge EU rules in court at all. There is a sort of ‘multi-level’ judicial protection system in place: the ECJ will rule on the validity of EU legislation when cases involving private parties are referred to it by a national court in the context of a preliminary procedure. Of course this remedy entirely depends on national standing rules and on the willingness of national courts to issue a reference to the ECJ. It also involves a lengthy procedure, which means that a contested EU measure could have been implemented over a long period of time before the

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<sup>22</sup> Final Report of Working Group IX "Simplification" (CONV 424/02) of 29 November 2002.

<sup>23</sup> Shapiro (2003), p. 227.

<sup>24</sup> Paul Craig & Gráinne De Búrca (2010), *EU Law. Text, Cases and Materials*, Oxford: Oxford University Press, fifth edition, p. 507.

ECJ rules it to be void. Finally the system leaves us with the strange situation that exactly in the case of EU Regulations, which apply directly without the link of national implementing measures, forging a way to the European Courts may prove impossible for individual applicants.

## Standing rights and participation

The question whether and, if so, how the extent of participatory rights in the decision-making process should matter for the determination of standing rights, is a recurring one. One line of reasoning here is that when an actor has participated before the decision was taken, he/or she has been accepted as a dialogic partner by the public body and should therefore have standing in front of the courts.<sup>25</sup> Applied in concrete terms to the EU context this involvement could help establish the ‘direct concern’ required for standing. Another possible logic is to say that standing rights should be granted as compensation for lack of participatory rights. The ECJ, in spite of its overall restrictive approach, seems to adhere to the former logic. When a Member State argued that participation rights before taking the decision justified lack of standing to appeal against the decision,<sup>26</sup> the ECJ shot down this line of reasoning. Also, Scott and Sturm have drawn attention to an encouraging development in the “notoriously and scandalously restrictive”<sup>27</sup> interpretation of standing requirements for nonprivileged actors by the ECJ, namely the rights-based reasoning that a person will be granted standing, where they enjoy “specific procedural guarantees conferring upon them a right to participate in the political process”.<sup>28</sup> Thus, at least in cases regarding decision-making at the EU level, the ECJ appears to agree that “granting standing to those who have already enjoyed the privilege of political participation” is not merely a matter of “giving these actors ‘another bite in court’” but of “encouraging respect for participatory rights and respect for participants in the practice of governance”. The best illustration of this reasoning is found in the *UEAPME* case in which an interest group that was on the Commission’s list of organisations with a right to participate at the early stage of the ‘social dialogue’ was granted standing, partly on this basis. However, this case did not involve the regular lawmaking process; the lack of involvement on the part of the European Parliament was in fact an important factor in the ECJ’s decision, which mentioned that the ‘participation of the people’ must be assured in a different way. Therefore, the *UEAPME* case, although often hailed as a landmark case for the liberalization of standing

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<sup>25</sup> A Dutch court has been known to take this approach when taking into account the fact that a certain interest group had submitted a popular initiative and as a consequence had been invited as a dialogic partner by the administrative authorities, when determining standing; District court Zwolle, 11 August 2011, LJN: BR4800.

<sup>26</sup> *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms Kommun genom dess Marknamnd*, Case C-263/08, [2009] E.C.R. I-9967; [2010] 1 C.M.L.R. 36.

<sup>27</sup> Scott & Sturm 2007, p. 13.

<sup>28</sup> *Ibid.*

rights, could in fact work as a precedent *against* widening standing in cases involving legislative acts.

## **Pre-Lisbon case law: restrictive on ‘individual concern’**

As has already become clear from the aforementioned, one term comes to mind in particular when describing the ECJ’s approach to standing rights in cases involving acts not addressed to a particular person: restrictive.<sup>29</sup> Especially the requirement of individual concern is extremely hard to satisfy for individual applicants, when appealing against acts of a general nature.<sup>30</sup> Even in cases where the measure at hand allowed for a more or less exact determination of the number and identity of the persons to whom the measure applied, this was not sufficient for the ECJ.<sup>31</sup> In *IPSO and USE v ECB* the Court declared that “[a]s regards the admissibility of the application, the mere fact that a regulatory act may affect the legal situation of an individual cannot, as the Community judicial system stands at present, suffice to enable that individual to be regarded as directly and individually concerned by that act”<sup>32</sup>. And in an additional observation the Court continued as follows: “Only the existence of specific circumstances by which a person is differentiated from all other persons and is thereby distinguished individually just as in the case of the person to whom a decision is addressed may enable that person to bring proceedings under the fourth paragraph of Article 230 EC against an act having general scope”.<sup>33</sup> There are indeed some rare cases in which an individual appeal against a general measure has been admissible, but those exceptions are invariably tied up with the specific circumstances of the case, for instance when a regulation explicitly mentioned the special situation of the applicants as a consideration to be taken into account.<sup>34</sup> Thus, the judicial reading of the pre-Lisbon standing rules may be summarized as follows: “natural and legal persons [may] institute proceedings against decisions as acts of individual application and against acts of general application such as a regulation which is of direct concern to those persons and affects them by reason of certain attributes peculiar to

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<sup>29</sup> “*Plaumann & Co v Commission* (25/62) [1963] E.C.R. 199; [1964] C.M.L.R. 29, denying direct and individual concern for an importer regarding a Decision addressed to a Member State refusing to authorise the Member State to suspend certain customs duties on imported goods.” See also case T-585/93, *Greenpeace International v. Commission* [1995] ECR II-2205.

<sup>30</sup> Case 38/64, *Getreide-Import*, *Jur.* 1965, p. 418.

<sup>31</sup> *Abertal Sat Limitada v Commission*, Case C-213/91, [1993] E.C.R. I-3177 at [17]; *Rica Foods v Commission* (T-47/00) [2002] E.C.R. II-113 at [39].

<sup>32</sup> Case T-238/00.

<sup>33</sup> Case T-238/00.

<sup>34</sup> Case C-152/88, *Sofrimport*, *Jur.* 1992, p. I-153.



them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee of a decision.”<sup>35</sup>

The former CFI (now: General Court, GC) has attempted to relax the rules on standing in the past, notably in the *Jégo-Quéré* case,<sup>36</sup> in which a group of fishermen asked the court to review a Community Regulation that prohibited drift-net fishing and was granted standing through an innovative interpretation of the requirement of individual concern.<sup>37</sup> The court – inspired by AG Jacobs’ opinion in the *UPA* case<sup>38</sup> – reasoned as follows:

“...in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard”.<sup>39</sup>

Then the court’s decision in *UPA* came and it was clear that by not following AG Jacobs’ line in this latter case *Jégo-Quéré*, too, would be overturned.<sup>40</sup> In that decision the ECJ maintained its stance that a complete system of legal remedies was already available to EU citizens, as a result of the ‘multi-level’ remedy of asking a national court for a preliminary reference.<sup>41</sup> The ECJ’s view that without ‘individual concern’, “an action for annulment (...) should not on any view be available” has led to the odd situation. Due to national restrictions on standing sometimes applicants would have to even break the law and wait for the national authorities to bring proceedings against them in order to challenge the compatibility of the national provisions with Union law and hopefully – eventually – the interpretation or validity of the EU measure itself. The restrictive interpretation did not happen for neglect of the principle of

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<sup>35</sup> *Inuit Tapiriit Kanatami and Others v Parliament and Council*, 6 September 2011, Case T-18/10. The Court essentially repeats the Plaumann test here.

<sup>36</sup> *Jégo-Quéré & Cie SA v Commission*, T-177/01, [2002] E.C.R. II-2365; [2002] 2 C.M.L.R. 44 at [41]-[51].

<sup>37</sup> For an extensive analysis see Nelly Stratieva, *Locus Standi for Private Applicants under Article 230 EC-...And Justice for All?*, European Studies: BA Paper, Maastricht University (downloadable from <http://www.montesquieu-instituut.nl/9353202/d/onderzoekspapers/2009/stratieva.pdf>), p. 7-8.

<sup>38</sup> Opinion in *Unión de Pequeños Agricultores v Council* (C-50/00 P) [2002] E.C.R. I-6677. The AG had already started to argue along these lines in an earlier case, see C-358/99 *Extramet Industrie SA v Council* [1991] ECR I-2501, [70]-[74].

<sup>39</sup> Case T-173/98 [1999] ECR II-3357.

<sup>40</sup> *Commission v Jégo-Quéré & Cie SA*, Case C-263/02, [2004] E.C.R. I-3425; [2004] 2 C.M.L.R. 12.

<sup>41</sup> *UPA*, Case C-50/00 P, [2002] E.C.R. I-6677 at [44].

effective judicial protection, which was discussed explicitly by the Court in the *UPA* case and ultimately dismissed as a basis to extend the scope of then Article 230(4) EC.<sup>42</sup>

The Court, also in extra-judicial communications,<sup>43</sup> has always taken the view that a system in which the national courts are responsible for protecting the rights of individuals, satisfies the requirements essential for the effective judicial protection of those rights.<sup>44</sup> However, in the context of the debate on a Constitution for Europe, the then President of the ECJ also conceded that whether or not to allow actions for annulment by private parties against measures of a general nature which concern them, is “first and foremost a policy choice”<sup>45</sup>. The idea that the Treaty, through what are now the Articles 267 and 263 TFEU, offers a “complete regime of legal protection” continued to be heavily criticized, paving the way for a textual reform as part of the (quasi-)constitutional deliberations taking place in the first decade of the 21<sup>st</sup> century.<sup>46</sup>

## **Crafting the reform of Article 263 para 4 TFEU**

Since the Court of Justice had refused to go beyond a narrow textual interpretation in the matter it was left up to the masters of the Treaties to deal with the persisting dissatisfaction with the rules on standing.<sup>47</sup> The Court in the *UPA* case had even made it clear explicitly that Treaty revision would be the only way to relax the standing requirements for non-privileged applicants.<sup>48</sup> The Commission in a letter to the Secretary of the Aarhus Convention Compliance Committee also explicitly conceded that the reforms of the standing rules induced by the Lisbon Treaty were meant to resolve the controversy surrounding the *UPA* and

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<sup>42</sup> *Unión de Pequeños Agricultores v Council*, C-50/00 P, [2002] E.C.R. I-6677 at [38]-[46]. See also Balthasar (2010).

<sup>43</sup> Oral presentation by M. Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, to the "discussion circle" on the Court of Justice on 17 February 2003, CONV 572/03 CERCLE I 6, p. 3, see <http://register.consilium.europa.eu/pdf/en/03/cv00/cv00572.en03.pdf>.

<sup>44</sup> Although one source reports some division of opinion on the matter amongs judges of the then Court of First Instance, see Oral presentation by M. Bo Vesterdorf, President of the Court of First Instance of the European Communities, to the "discussion circle" on the Court of Justice on 24 February 2003, p. 4, see <http://register.consilium.europa.eu/pdf/en/03/cv00/cv00575.en03.pdf>.

<sup>45</sup> *Ibid.*

<sup>46</sup> See for a list of seven points of criticism, Craig & De Búrca, 5th edition, p. 506. See also Granger, M.-P. (2003), ‘Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo-Quéré et Cie SA v Commission* and *Unión de Pequeños Agricultores v Council*’, *The Modern Law Review*, 66, pp. 124-31.

<sup>47</sup> The dissatisfaction does not concern individuals and interest groups only. See Graber’s contribution in this volume for an analysis of the effects of the standing rules on regions and other local entities.

<sup>48</sup> *Unión de Pequeños Agricultores v Council*, C-50/00 P, [2002] E.C.R. I-6677

*Jégo-Quéré* cases.<sup>49</sup> The revision materialised, but not in the capacity of a relaxation of the individuality requirement, but as a new category of acts that are appealable for non-privileged applicants.

The introduction of a new category of ‘regulatory acts which are of direct concern to non-privileged applicants and do not entail implementing measures’ goes back to the proposed Article III-365(4) of the Constitutional Treaty. Initially it was proposed to phrase the core of the new provision as ‘an act of general application’, a majority being in favour of this.<sup>50</sup> The Praesidium in the end opted for the term ‘regulatory act’,<sup>51</sup> on the grounds that this wording would enable a distinction to be made between legislative acts and regulatory acts, “maintaining a restrictive approach in relation to actions by individuals against legislative acts”.<sup>52</sup> The desirability of such a distinction was explicitly tied to the choice to further a hierarchy of norms at the EU level: if this “were to become a reality, it would seem appropriate to continue to take a restrictive approach to actions by individuals against legislative measures and to provide for a more open approach with regard to actions against regulatory measures.”<sup>53</sup> According to an official report it was even the broadly shared hope of the Members of the CFI that a distinction would be drawn between legislative measures and regulatory measures,<sup>54</sup> by enabling individuals to challenge the second category of measures (regulatory measures).<sup>55</sup>

The provision became part of the Lisbon Treaty without any textual changes as Article 263(4) TFEU, leaving commentators to wonder whether a broad interpretation<sup>56</sup> (all general

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<sup>49</sup> European Commission, Communication to the Aarhus Convention Compliance Committee concerning compliance by the European Community with provisions of the Convention in connection with access to members of the public to review procedures (ACCC/C/2008/32), Brussels, 26 February 2010.

<sup>50</sup> Final report of the discussion circle on the Court of Justice, Brussels, 25 March 2003, CONV 636/03, CERCLE I 13, p. 8, see <http://register.consilium.europa.eu/pdf/en/03/cv00/cv00636.en03.pdf>.

<sup>51</sup> Cover note of the Praesidium of the Convention (Secretariat of the European Convention, CONV 734/03) of 12 May 2003.

<sup>52</sup> Initially proposed in a document prepared by Mr Vitorino as Chairman of Working Group II (working document 21 of 1 October 2002, paragraphs 8 to 12).

<sup>53</sup> Oral presentation by M. Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, to the "discussion circle" on the Court of Justice on 17 February 2003, p. 3, see <http://register.consilium.europa.eu/pdf/en/03/cv00/cv00572.en03.pdf>.

<sup>54</sup> See the Final Report of Working Group IX "Simplification"; CONV 424/02 of 29 November 2002.

<sup>55</sup> Oral presentation by M. Bo Vesterdorf, President of the Court of First Instance of the European Communities, to the "discussion circle" on the Court of Justice on 24 February 2003, p. 4, see <http://register.consilium.europa.eu/pdf/en/03/cv00/cv00575.en03.pdf>.

<sup>56</sup> M. Dougan, ‘The Treaty of Lisbon 2007: winning minds, not hearts’, (2008) 45 *C.M.L. Rev.* 617, 675-679; J. Bast, ‘Legal Instruments and Judicial Protection’, in: A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Beck: Munich, 2010), 345, at p. 396-397.

measures?) or rather an narrow interpretation<sup>57</sup> (only (some) non-legislative acts) was in order. On the basis of the new formulation, two critiques were articulated in the literature: 1) the phrase in the Treaty introduces new and unnecessary terminological confusion and 2) the relaxation does not go far enough and does not solve the problem that it is still incompatible with the principle of effective judicial protection.<sup>58</sup> As mentioned, this contribution does not specifically elaborate upon the judicial protection argument. The next section sets out how the ECJ dealt with the fact that there is no definition of the term ‘regulatory acts’ in the Treaty and with the unclear relationship between this term and the terms legislative, non-legislative, implementing and delegated acts.

## Recent case law: still restrictive?

Interestingly, even before the new provision allowing any natural or legal person to institute proceedings ‘against a regulatory act which is of direct concern to him or her and does not entail implementing measures’ ever became law, it was invoked in judicial proceedings in front of the European Courts, or the General Court to be precise. In *Eridania Sadam and Others v Commission*<sup>59</sup> the applicants argued that the new provision was “purely declaratory” as it simply was an expression of the pre-existing right of effective recourse to a competent court. Therefore, since the applicants did not need the provision for standing rights that could be directly based on the principle of effective judicial protection, it did not matter that it had not yet entered into force. As expected, the Court did not follow this reasoning, since doing otherwise would deviate from the Court’s viewpoint that the principle of effective judicial protection cannot be a self-standing basis for standing rights.

After the new provision entered into force there have been cases in which the non-qualification of the contested measure as a ‘regulatory act’ was raised as part of a plea of inadmissibility but since the application was already deemed inadmissible on other grounds, there was no reason for the Court to look into it.<sup>60</sup> In *Norilsk Nickel Harjavalta and Umicore v Commission*<sup>61</sup> the last phrase of Article 263 TFEU had been brought into the proceedings as

<sup>57</sup> “A. Türk, *Judicial Review in EU Law* (Cheltenham: Edward Elgar, 2009), pp.168-169; R. Barents, *Het verdrag van Lissabon: achtergronden en commentaar* (Kluwer: Deventer, 2008), p.508; R. Streinz, C. Ohler and C. Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 3rd edn (Munich: Beck, 2010), p.116; Dashwood and Johnston, “The institutions of the enlarged EU under the regime of the constitutional treaty” (2004) 41 C.M.L. Rev. 1481, 1509; A. Hatje and A. Kind, “Der Vertrag von Lissabon--Europa endlich in guter Verfassung?” (2008) N.J.W. 1761, 1767.”

<sup>58</sup> See also Stratieva, p. 11.

<sup>59</sup> Case T-386/04, 28 June 2005.

<sup>60</sup> Such as in cases T-1/10, *PPG and SNF v ECHA*; T-268/10, *PPG and SNF v ECHA*; T-343/10, *Etimine and Etiproduits v ECHA* and T-346/10, *Borax Europe v ECHA*.

<sup>61</sup> *Norilsk Nickel Harjavalta and Umicore v Commission*, Case T-532/08.

an argument, but the Court ruled that “even if the fourth paragraph of Article 263 TFEU, in particular the last phrase of the paragraph, could in the present case confer on the applicants a *locus standi* which they did not have under the fourth paragraph of Article 230 EC, that standing could not be taken into account for the purposes of assessing the admissibility of the present action”,<sup>62</sup> because the period for bringing proceedings had already expired when Article 263 TFEU entered into force on 1 December 2009. Did the Court’s choice of words (“even if ...”) already reveal a reluctance to interpret the new standing rules for regulatory appeals generously?

Considering the new formulation of Article 263 para 4 TFEU there are two elements that trigger question marks. First, the meaning of the term ‘regulatory act’ and, second, the phrase “does not entail implementing measures”. The latter element was clarified by the Court in *Arcelor v Parliament and Council*.<sup>63</sup> Regarding the consequences of the entry into force of the fourth paragraph of Article 263 TFEU, the Parliament and the Council, supported by the Commission, submitted that the new wording of the standing rules was not intended to alter too much. Whereas the institutions and the applicant focused their argument on whether the contested directive was a regulatory act within the terms of the new provision, the court only stipulated that the directive did entail implementing measures since “Member States have a broad discretion with regard to implementation of the contested directive”.

By order of 6 September 2011 in *Inuit Tapiriit Kanatami and Others v Parliament and Council*,<sup>64</sup> the General Court offered an interpretation of the new standing rules for actions against ‘regulatory acts’. Regulation No 1007/2009 on trade in seal products which imposed a ban on imports into the EU and sale of products deriving from all species of seals was contested by a consortium of natural persons, commercial companies and non-profit-making organisations and associations representing Inuit interests, on the grounds that a) Article 95 EC (now Article 114 TFEU) did not constitute a valid legal basis for the contested regulation, b) proportionality was infringed and c) their fundamental rights were violated. However the Court never got to deal with the substance of these arguments since the case crucially stranded on a standing issue and as such became a first landmark ruling on the interpretation of Article 263 TFEU. It was quite clear that the applicants would not be individually concerned, but they might qualify for ‘directly concerned’ and the admissibility of their appeal therefore hinged on the applicability of the fourth paragraph of Article 263 TFEU to the proceedings. The Court decided that the Regulation was not a regulatory act within the meaning of the fourth paragraph of Article 263 TFEU. Therefore the combined requirements of individuality and directness applied.<sup>65</sup> Predictably – and in line with the pre-Lisbon case law – this resulted in the General Court declaring the applicants’ action inadmissible.<sup>66</sup>

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<sup>62</sup> *Ibid.*

<sup>63</sup> Case T-16/04, 2 March 2010.

<sup>64</sup> Case T-18/10.

<sup>65</sup> “Secondly, it examined the possible direct effect of that regulation on the applicants’ situation, concluding, in paragraphs 85 and 86 of the order, that, with the exception of Ta Ma Su Seal Products Inc., NuTan Furs Inc., GC Rieber Skinn AS and the Canadian Seal Marketing Group, which were active in the processing and/or marketing

Let us take a closer look at the reasoning in *Inuit Tapiriit Kanatami and Others v Parliament and Council*.<sup>67</sup> The applicants - Inuit or associations representing Inuit - submit that the conditions of the fourth paragraph of Article 263 TFEU are fulfilled “inasmuch as there is a direct causal link between Regulation No 1007/2009 and the situation of each of the applicants, since the Member States have no discretion as regards its application and it is not necessary to adopt implementing measures in order for the prohibition set out in Article 3(1) of that regulation to be applicable”<sup>68</sup>. The counter stance put forward by the Parliament and the Council is that Regulation No 1007/2009 is a legislative act, “inasmuch as it was adopted by the co-decision procedure referred to in Article 251 EC”<sup>69</sup> and which “must therefore be considered as coming within the same category as acts adopted in accordance with Article 294 TFEU, which, according to the terms of Article 289(1) and (3) TFEU, are indeed legislative acts”. As a subsidiary argument the Parliament and the Council put forward that the action should not be admissible on the ground that Regulation No 1007/2009 requires implementing measures, “in particular with regard to the definition of the conditions under which the placing on the market of seal products resulting from hunts traditionally conducted by Inuit is to be allowed”.

The Court engaged in extensive argumentation regarding the meaning of the term ‘regulatory act’ for the purposes of the fourth paragraph of Article 263 TFEU. After confirming that “although that provision introduces a change from the EC Treaty so far as concerns access to the Courts of the European Union [...] the meaning of ‘regulatory act’ is not defined by the FEU Treaty”,<sup>70</sup> the Court stated that it “must carry out a literal, historical and teleological interpretation of that provision”.<sup>71</sup> According to the Court the fourth paragraph of Article 263 TFEU adds a new possibility to the range of appealable decisions for individual applicants and that “[i]t is apparent from the ordinary meaning of the word ‘regulatory’ that the acts covered by that third possibility are also of general application”<sup>72</sup>. However the Court goes on to reason that “[a]gainst that background” the term ‘regulatory act’ “does not relate to all acts of general application, but to a more restricted category”<sup>73</sup>. The Court sets out to sum up the

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of seal products, the other applicants were not directly concerned by the regulation. Finally, the General Court examined the possible effect of the regulation on the individual situation of those four applicants and found, in paragraph 93 of the order, that they were not individually concerned by the regulation.”

<sup>66</sup> In paragraph 94 of the order in Case T-18/10.

<sup>67</sup> In Case T-18/10 R, 30 April 2010.

<sup>68</sup> Para 30.

<sup>69</sup> Para 32.

<sup>70</sup> Para 39.

<sup>71</sup> Para 40.

<sup>72</sup> Para 42.

<sup>73</sup> Para 43.

“categories of acts of the European Union which may be subject to a review of legality, namely, first, legislative acts and, secondly, other binding acts intended to produce legal effects vis-à-vis third parties, which may be individual acts or acts of general application”<sup>74</sup>. The GC essentially reformulated the provision as follows:

“It must be concluded that the fourth paragraph of Article 263 TFEU, read in conjunction with its first paragraph, permits a natural or legal person to institute proceedings against an act addressed to that person and also (i) against a legislative or regulatory act of general application which is of direct and individual concern to them and (ii) against certain acts of general application, namely regulatory acts which are of direct concern to them and do not entail implementing measures.”<sup>75</sup>

The Court also engaged in comparative linguistic interpretation when it looked at the words equivalent to the word ‘regulatory’ in the different language versions of the Treaty. In particular the Court investigated how the term is being used in juxtaposition to the word ‘legislative’ in a number of other provisions of the Treaty, “in particular Article 114 TFEU, concerning the approximation of the ‘provisions laid down by law, regulation or administrative action in Member States’”<sup>76</sup>. The outcome of the exercise remains a bit unclear, but in any case it did not persuade the Court that ‘regulatory’ can be seen as an umbrella term. The GC did state that the scope of the final part of the fourth paragraph of Article 263 TFEU is not to limit the scope of that provision solely to delegated acts within the meaning of Article 290 TFEU, but more generally, to regulatory acts.<sup>77</sup> The Court concluded that “the wording of the fourth paragraph of Article 263 TFEU does not allow proceedings to be instituted against all acts which satisfy the criteria of direct concern and which are not implementing measures or against all acts of general application which satisfy those criteria, but only against a specific category of acts of general application, namely regulatory acts. Consequently, the conditions of admissibility of an action for annulment of a legislative act are still more restrictive than in the case of proceedings instituted against a regulatory act.”<sup>78</sup>

Contrary to Balthasar’s predictions,<sup>79</sup> the Court also referred to the argumentation that was used when originally proposing the new provision in the process of designing the Constitutional Treaty (see above) in support of a restrictive reading of the new standing rules, arguing that the term ‘regulatory act’ had been deliberately chosen to secure limited *locus standi*. Considering that it seems to be this historical interpretation which sways the courts towards a restrictive interpretation, it is quite a stretch for the Court to use preparatory

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<sup>74</sup> Para 44.

<sup>75</sup> Para 45.

<sup>76</sup> Para 46.

<sup>77</sup> Para 48.

<sup>78</sup> Para 50.

<sup>79</sup> Balthasar (2010), p. 3.

materials of the Convention in support of a historical interpretation of a provision of the Lisbon Treaty, as Balthasar has pointed out.<sup>80</sup> The ‘drafters’ intent’ is a precarious issue here, especially because it is a) unclear how many of the members of the discussion circle on the Court of Justice wanted to exclude legislative acts from direct challenge<sup>81</sup> and b) very questionable whether these members can properly be considered ‘drafters’. Also the supporting materials used in the negotiations of the Lisbon Treaty have not been published, nor have the negotiations reliably been reported on. This, however, seems to be an argument against relying on historical interpretation rather than a justification for referring to materials from another drafting process as an authoritative source. That said, it is clear that at the time the text of the current provision was drafted, this was done with the idea that ‘regulatory’ would come to denote all acts that are not of a ‘legislative’ nature in mind. In that reading, somewhere in the process of vetting the text of the Lisbon Treaty, someone simply forgot to replace the term ‘regulatory’ by ‘non-legislative’. In any case no recent proper discussion on who should have access to court to contest general rules in the post-Lisbon constellation has taken place at the level of the ‘constituent power’, or anything that comes close to it. We are left with the strange situation that a problem the court had refused to solve judicially because it is a ‘policy issue’, has been decided upon extra-judicially by member of that same court in the context of pre-deliberations for a constitutional text that never saw the light of day as such.

The GC once more explicitly addressed the right to effective judicial protection as laid down in Article 47 of the Charter of Fundamental Rights of the European Union: “the Courts of the European Union may not, without exceeding their jurisdiction, interpret the conditions under which an individual may institute proceedings against a regulation in a way which has the effect of setting aside those conditions, expressly laid down in the Treaty, even in the light of the principle of effective judicial protection”.<sup>82</sup>

The applicants had argued that a ‘broad’ interpretation of the fourth paragraph of Article 263 TFEU was warranted in view of “two international Conventions adopted within the context of the United Nations, namely the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters” but the ECJ insisted the issue of standing should be treated separately from the issue of participation.<sup>83</sup>

The conclusion of the Court is that “the meaning of ‘regulatory act’ for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application apart from legislative acts”<sup>84</sup>. This means that for appeals against legislative acts,

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<sup>80</sup> Balthasar (2010).

<sup>81</sup> Balthasar (2010).

<sup>82</sup> Para 51.

<sup>83</sup> Paras 52-53.

<sup>84</sup> Para 56.



the requirements of direct *and* individual concern – nearly impossible to satisfy for natural persons – still apply. According to the Court, since “the procedure defined in Article 294 TFEU reproduces, in essence, that defined in Article 251 EC, it must be concluded that, within the categories of legal acts provided for by the FEU Treaty, the contested regulation must be categorised as a legislative act”. The applicants had submitted that the nature of an act is not determined by the procedure followed to adopt it, but by its scope, which can either be individual or general.<sup>85</sup> In other words, “the adjective ‘regulatory’ should be interpreted as having its common meaning, namely as referring to an act that aims to lay down the applicable rules in general”<sup>86</sup>. The Court killed this line of reasoning as well, by stating that the categorisation of an act of general application “as a legislative act or a regulatory act according to the FEU Treaty is based on the criterion of the procedure, legislative or not, which led to its adoption”<sup>87</sup>.

The *Inuit* case has been cited in another case regarding a ‘regulatory’ annulment, *Microban International and Microban (Europe) v Commission*.<sup>88</sup> The applicants applied for an annulment of a Commission Decision<sup>89</sup> concerning the non-inclusion of a certain additive (triclosan) in a list of substances which may be used in the manufacture of plastic materials and articles intended to come into contact with foodstuffs. However, in this case the Court arrived at the conclusion that the contested measure was in fact a ‘regulatory act’ – something the Commission had argued it was not. Since the applicants were not the addressees of the contested decision their only options to bring an action for annulment under Article 263 TFEU were if the decision could either be seen as a regulatory act which is of direct concern to them and did not require implementing measures, or a decision of direct and individual concern to them. The difference with the *Inuit* case is therefore that here the question is whether the measure is general enough to qualify as ‘regulatory’, whereas in *Inuit* the measure was deemed ‘too legislative’. The Court repeats the definition of ‘regulatory act’ it gave in *Inuit*: “all acts of general application apart from legislative acts”.<sup>90</sup> The Court decides that in the present case we have a ‘regulatory act’ at hand since the contested decision “was adopted by the Commission in the exercise of implementing powers and not in the exercise of legislative powers”<sup>91</sup> and “is of general application in that it applies to objectively determined

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<sup>85</sup> Para 62.

<sup>86</sup> Para 62.

<sup>87</sup> Para 65.

<sup>88</sup> Case T-262/10, 25 October 2011.

<sup>89</sup> 2010/169/EU of 19 March 2010 concerning the non-inclusion of 2,4,4’-trichloro-2’-hydroxydiphenyl ether in the Union list of additives which may be used in the manufacture of plastic materials and articles intended to come into contact with foodstuffs under Directive 2002/72/EC (OJ 2010 L 75, p. 25).

<sup>90</sup> Para 21.

<sup>91</sup> “In the present case, the legal basis cited by the contested decision is Article 11(3) of Regulation No 1935/2004. That article provides that a measure taken by the Commission on the basis of that article is to be adopted in accordance with the procedure referred to in Article 5a(1) to (4) and (5)(b) of Council Decision

situations and it produces legal effects with respect to categories of persons envisaged in general and in the abstract”<sup>92</sup>.

## **Conclusion: what change in regulatory dynamics?**

So the Court has spoken. The term ‘regulatory’ stands for a distinctive and limited category of acts; it is not an umbrella term for abstract and general norms, nor is it synonymous to the term ‘legislative’. It is fair to say that the Court played safe by interpreting the new standing provision in almost the most restrictive way possible. There does not seem to be much left of the ‘catalyst’ role, Scott and Sturm so optimistically observed a few years ago. Shapiro has pointed out that the position of the ECJ is very different from the position of the (highest) administrative courts in Member States possessing such courts, but rather more akin to a ‘supreme court’, perhaps even the US Supreme Court.<sup>93</sup> However, in cases such as *Inuit* the Court, in the capacity of the General Court in this instance, did adopt the formalistic reasoning often found in administrative courts. In order to answer the question how the recent case law fits with current thinking on the relationship between legislation proper and ‘lower’ forms of rulemaking in the EU, I draw out three points.

First of all, the question arises what *are* regulatory acts then, concretely speaking? What category of decisions *will* fall within the scope of the newly set boundaries of ‘regulatory *locus standi*’? To return to our analysis of pre-Lisbon case law, the *Jégo-Quéré* case under the new rules would have been admitted, as the contested regulation was of a ‘non-legislative’ nature, namely an act adopted under delegation. However, to the applicants in *UPA*, where the regulation at hand was what we would now call ‘legislative’, the new standing possibilities would not be of help. Since *Inuit* we have seen examples of the kind of measures that will be increasingly fought in court,<sup>94</sup> namely those with a strong impact on specific sectors, which the Court will be asked to review for breach of proportionality. This will put pressure on the Commission to further develop its emerging practice of impact assessments for non-legislative measures. From the non-legal perspective of Better Regulation though, what could really help further develop pre-legislative (and ‘pre-regulatory’ as we should now say) standards of care would be remedies against failures to act.<sup>95</sup>

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1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23), as amended”.

<sup>92</sup> Para 22.

<sup>93</sup> See also Shapiro (2003), p. 233.

<sup>94</sup> *Canon Europa v Commission*, T-34/11 .

<sup>95</sup> John Temple Lang (2011), ‘Remedies for the Commission's failure to act in "comitology" cases’, *European Law Review*, 36(2), 264-275.

Second, the question whether this interpretation of the new standing rules will reinforce the hierarchy of norms in the EU, should be answered affirmative in my view. Although the Lisbon Treaty did not embrace the hierarchy of legal norms in as principled a manner as the unraveled European Constitution did,<sup>96</sup> the distinction between legislative and non-legislative acts now seems to be more firmly set. Indeed, at least implicitly, the ECJ's reasoning in *Inuit* seems to rely on the logic of differing treatment of 'primary' and 'delegated' legislation which is present most Member States' legal systems. The argument here is that the risk of illegitimately overriding the preferences of the democratic majority is outweighed by the need to ensure consistency of lower norms and higher ones in the case of delegated legislation but not in the case of primary legislation. As such the stance taken in *Inuit* can be taken as judicial confirmation that EU legislative acts can be seen as the output of a proper democratic process and not as the product of 'upwards' delegation by the Member States. The recent developments also illustrate how the EU judicial system is grounded in the Germanic tradition, in which administrative courts typically only exercise control over concrete applications of rules. However, the Court at the moment seems to wear the hat of a 'supreme' or even 'constitutional' court when it so pleases, and to resort to acting as an 'administrative' court on other occasions.

Even with a restrictive interpretation though, the new standing rules will allow for some interesting 'regulatory' case law in relation to the hierarchy of norms to develop. For instance, applicants contesting a 'regulatory act' could invoke Article 249B of the Treaty of Lisbon which only allows for delegation of 'non-essential' elements of a legislative act. As 'non-privileged applicants' have the opportunity to bring such actions now, there will be more cases through which the Courts can develop the case law on prohibited delegation of essential elements. The widening of the standing rules will mean that a greater variety of cases will be brought, and institutional interests will no longer be the primary driver of such cases. As more cases driven by economic interests primarily, such as *Inuit*, will be heard, further refinement of the case law on the use of impact assessment and related instruments in supporting proportionality analyses is to be expected.<sup>97</sup> A second, more legal, issue to be developed further is how to deal with legislative acts that include the possibility of amendment of an annex or implementing measures through a non-legislative procedure.

Third, we can ask whether we will see greater or lesser use of 'non-legislative acts' as a result of the new incentive structure created by the court. From the perspective of wanting to avoid excesses of regulatory litigation – such as 'ossification' or paralysis of the rulemaking institutions – does the distinction between legislative and regulatory acts make sense? Balthasar has argued that a wider scope of Article 263(4) would not significantly increase the

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<sup>96</sup> Balthasar cites former ECJ judge Everling arguing "that art. 263(4) TFEU should be read as referring to all kinds of regulations, including legislative acts, in particular because the and thus appears not to make a fundamental distinction between legislative and non-legislative acts", Balthasar (2010) citing U. Everling, "Rechtsschutz in der Europäischen Union nach dem Vertrag von Lissabon" (2009) *Europarecht*, Beiheft 1, 71, 74.

<sup>97</sup> See the contribution by Keyaerts in this volume.

litigation case load for the EU institutions as the vast majority of regulations are of a non-legislative nature in any case.<sup>98</sup> However the number of initiatives published in the Official Journal and the number of pages they consist of do not say anything about the ‘regulatory impact’ those initiatives may have. On a positive note, the recent restrictive case law on standing may inadvertently have given the EU Institutions an incentive to regulate more through legislative acts, thus providing a counterweight to the tendency to regulate more and more through delegated and implementing acts. However, this is not the result of a conscious and balanced consideration regarding the institutional structure of the EU, but of sloppy Treaty drafting and ‘path dependent’ judicial embracing of a tradition of restrictive standing rights.

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<sup>98</sup> Balthasar (2010).